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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1155

TRI-SERVICE DRILLING COMPANY and BRAHANEY DRILLING COMPANY, PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 38-44), covering both the *Tri-Service* and the *Brahaney* cases (which were consolidated for decision), is not yet officially reported. The decision and order of the National Labor Relations Board in *Tri-Service* are reported at 176 NLRB No. 35, and its decision and order in *Brahaney* are reported at 176 NLRB No. 34.

JURISDICTION

The judgment of the court of appeals (Pet. App. 36-37) was entered on October 28, 1970. The petition for a writ of certiorari was filed on December 23, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether in these cases the Board properly applied the eligibility standards for voting in representation elections in the oil drilling industry, which it had formulated in *Hondo Drilling Co.*, 164 NLRB 416, and *Carl B. King Drilling Co.*, 164 NLRB 419.

2. Whether the Board violated the Administrative Procedure Act in formulating the *Hondo-King* eligibility standards.

STATUTE INVOLVED

In addition to the provisions set forth at Pet. App. 23-25, the other relevant provision of the National Labor Relations Act (29 U.S.C. 151, *et seq.*) is:

> Sec. 8(a) It shall be an unfair labor practice for an employer—
>
> * * * *
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

STATEMENT

A. Introduction

In *Hondo Drilling Co.*, 164 NLRB 416, 417, the Board found that:

> • • • [A]lthough Hondo maintains an almost continuous drilling operation, the amount of time spent on a single drilling job is relatively short. Not all of those employed by Hondo have a continuing interest in, or an expectancy of, reemployment as is indicated by the high turnover among its employees. However, all employees who have not been terminated for cause or who have not quit voluntarily before the completion of the particular job are considered eligible for reemployment with Hondo. Moreover, a significant number of these employees have maintained a continuing interest in employment with Hondo, as is evidenced by the fact that they have accepted reemployment and have worked a substantial number of days during the year.

The Board concluded that, in these circumstances, it was necessary to devise a special "eligibility formula[1] which will protect and give full effect to the voting rights of those employees who have a reasonable expectancy of future employment with Hondo," without being so broad "that it will permit the question of union representation to be decided by those individuals who have no likelihood of reemployment with the Employer" (*id.* 417-418). The Board further concluded that this objective could best be achieved by limiting eligibility (*id.* at 418):

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[1] Generally, only those employees on the employer's payroll at the time of the election are eligible to vote.

> to all roughnecks who have been employed by the Employer for a minimum of 10 working days during the 90-calendar-day period preceding the issuance of our Decision and Direction of Election herein, and who have not been terminated for cause or quit voluntarily prior to the completion of the last job for which they were employed, as well as all roughnecks whose names appear on the Employer's payroll list immediately preceding the issuance of the Regional Director's Notice of Election in this proceeding.

In *Carl B. King Drilling Co.*, 164 NLRB 419, decided the same day, the Board applied the *Hondo* eligibility formula to another oil drilling operation which it found to be essentially similar to the Hondo operation.[2]

B. The proceedings before the Board in the present cases

Tri-Service and Brahaney are engaged in the drilling of oil and gas wells in the Permian Basin area in west Texas and east New Mexico (A. 2; B. 2).[3] In February and March 1968, Local 826, International Union of Operating Engineers, filed petitions with the Board's Regional Director, pursuant to Sec-

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[2] The Board found it insignificant that Hondo used small rigs capable of drilling only 11,000 feet, while King used heavy duty rigs capable of drilling to 20,000 feet; and that the average drilling time per well for Hondo was 18 days, while the norm for King was 60-70 days. 164 NLRB at 417, 420.

[3] "A." and "B." refer to the joint appendix to the briefs in *Tri-Service* and *Brahaney*, respectively, in the court of appeals.

tion 9(c) of the Act, for representation elections among the Companies' employees. The Regional Director approved stipulations of the parties providing that the bargaining units would consist of "all derrickmen, motormen, and floorhands, otherwise referred to as roughnecks, employed by the Employer in drilling operations in the area generally known as the Permian Basin" (A. 120; B. 105). The stipulation further provided that, while the Companies reserved their right to challenge before the Board applicability of *Hondo* and *King* (A. 118; B. 104), the test for voter eligibility would be the same as that used in those cases. That is, the employees eligible to vote would include not only those appearing on the employer's payroll immediately prior to the issuance of the Regional Director's notice of election, but also those who, in the preceding 30-calendar days, were employed by the employer for a minimum of 10 working days and who had not been terminated for cause or quit voluntarily prior to the completion of the last job on which they were employed. (A. 5-6, 115-116; B. 103.)

The Union won the elections in both units, and the Board, overruling the Companies' objections to the elections based, in part, on the use of the *Hondo-King* formula, certified the Union as the representative of the Companies' employees (A. 129, 135, 148-151; B. 106-107, 108, 113-114). When the Companies refused the Union's request to bargain, the Union filed unfair labor practice charges, and the General Counsel of the Board issued complaints charging that the Companies had violated Section 8(a)(5) and (1)

of the Act (A. 1-2; B. 2). A separate hearing on each complaint was held before a Trial Examiner of the Board, who permitted each Company to adduce evidence concerning its operations and the propriety of applying the *Hondo-King* formula thereto (A. 5; B. 4). The relevant facts concerning each operation are:

Tri-Service owns 7 rigs and drills to depths of between 5,000 and 20,000 feet (A. 8-9; 70). The drilling operation requires the services of a driller and 4 roughnecks, on each of 3 shifts (A. 9; 70-71). The driller, who is a supervisor, is responsible for hiring his own crew (A. 9; 71). The number of days required to drill a well depends largely upon the depth of the well. During the period April 1, 1967 to March 31, 1968, the average time for drilling a Tri-Service well was 59.5 days (A. 9; 152-156).

Brahaney owns 5 drilling rigs, manned and operated in the same fashion as the Tri-Service rigs. Brahaney drills wells between 9,000 and 13,500 feet deep. During the period January 1966 through February 1968, the average time for drilling a Brahaney well was 56 days (B. 6-7).

Tri-Service and Brahaney have a high turnover of roughnecks. Many leave work because of the difficulties of traveling long distances from their homes to the well sites (A. 10, 108-109; B. 7-8, 85, 90); some leave to work on a deeper well in order to insure longer steady employment (A. 10); others quit to rest from the arduous 7-day workweek or for various personal reasons (A. 10, 108; B. 8, 42, 76);

still others may be displaced from their jobs by crews who have greater seniority with the particular drilling company (A. 10, 106; B. 8, 86, 90-92, 96). Although for these reasons turnover is high, many roughnecks become rehires for one or more companies and work for one company several times during the year (A. 10).

Between April 1, 1967, and March 31, 1968, Tri-Service operated a maximum of 6 rigs, and an average of only 4 rigs at any one time (A. 12; 92, 154-156). Thus, Tri-Service would have required a maximum of 72 and an average of 48 roughnecks during that period if all had continued to work as and when they were needed. However, due to the turnover, it actually employed 384 roughnecks during this period, who worked for periods of time ranging from 301 days or more to 10 days or less. (A. 12-13; 152-153.)

Similarly, between January 1966 and February 1968, Brahaney operated an average of 2.08 rigs at any one time (B. 6; 118). Thus, Brahaney would have required an average of 24 roughnecks during that period if there were no turnover. During 1967, however, Brahaney actually employed 228 roughnecks, who worked an average of 32 days. (B. 8.)

On the basis of the foregoing facts, the Trial Examiner concluded that the operations of Tri-Service and Brahaney were not significantly different from those in the *Hondo* and *King* cases, and that it was therefore proper to apply the voter eligibility formula utilized in those cases (A. 13; B. 19). The Board, adopting the Examiner's findings and conclusions, held

that Tri-Service and Brahaney violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union as the duly certified bargaining agent of their employees and ordered the Companies, *inter alia*, to bargain with the Union upon request. (A. 19-21, 14-17; R. 14, 10-12.)

C. The Decision of the Court of Appeals

The court of appeals held that the Board "did not abuse its discretion in finding that the *Hondo* formula is applicable to the operations of both [Companies]." Accordingly, it enforced the Board's orders in both cases. (Pet. App. 44.)

ARGUMENT

1. Petitioners' basic contention is that the Board improperly applied the *Hondo* eligibility formula to them, even assuming its validity, because the facts here, which were "misinterpreted" by the court of appeals, show that their operations are significantly different from those in the *Hondo* case (Pet. 16-17). Such a factual issue does not warrant review by this Court.[4] Moreover, the court of appeals correctly held

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[4] The court, following its earlier decision in *National Labor Relations Board* v. *Hondo Drilling Co.*, 422 F. 2d 943—where it had sustained the general validity of the *Hondo* formula and found no merit to the contention that it was promulgated in violation of the Administrative Procedure Act—also rejected the latter contention here (Pet. App. 43).

[5] Insofar as petitioners' contention that the eligibility formula utilized here is invalid because it provides for the inclusion of "non-employees" (Pet. 13-14) may be interpreted as a general attack on the substantive validity of the *Hondo*

the Board reasonably concluded that the facts of the present cases were in all relevant respects essentially similar to those in *Hondo* and the companion *King* case. As the court stated (Pet. App. 43-44):

> Both companies would distinguish themselves from Hondo Company on the ground that it was characterized as a "small-rig" company while they utilize longer drills. The crux of their argument is that they offer opportunities for longer sustained employment than Hondo, that some of their employees take advantage of this possibility, and that to make short-term employees eligible to vote is unfair to those who have a more consistent relationship of employment with the company. In comparison with Hondo itself, this argument has some slight merit with respect to Tri-Service. But Tri-Service's employment patterns do not appear significantly different or more stable than those in *King*, the companion case to *Hondo*.[*]

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formula, that attack is foreclosed. In the court below, petitioners merely challenged the propriety of applying the formula to their particular operations. In any event, as the court below pointed out in *National Labor Relations Board* v. *Hondo Drilling Co.*, 423 F. 2d at 965-966, under established principles an intermittent employee is entitled to vote in a Board election if he is sufficiently concerned with the terms and conditions of employment in the unit to warrant his participation in the selection of a collective bargaining agent. The *Hondo* formula is designed to extend voting rights to those employees "who could reasonably anticipate future employment with the company." *Id.* at 966.

[*] As to Brahaney, the court added (Pet. App. 44 n. 5):

> It has little merit with respect to Brahaney * * *. The average period of employment for each Brahaney em-

2. Petitioners also contend (Pet. 18-20) that the Board, in establishing the *Hondo* formula, was announcing a rule to govern all cases in the oil drilling industry, and thus should have followed the formal rule-making requirements of the Administrative Procedure Act, 5 U.S.C. (Supp. V) 553.[1] As this Court stated in *National Labor Relations Board* v. *Wyman-Gordon Co.*, 394 U.S. 759, 765-766, however: "Adjudicated cases may and do, of course, serve as vehicles for the formulation of agency policies which are applied and announced therein. * * *. They generally provide a guide to action that the agency may be expected to take in future cases." The formula used in *Hondo* and *King* was not automatically applied in the instant cases. Petitioners were provided an opportunity to contest the applicability of the formula to their situations, and it was applied only after the Trial Examiner and the Board concluded, based on the evidence in the record, that the facts of both cases were so similar to *Hondo* and *King* that these cases should be followed.

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ployee in 1967, while obviously an incomplete indicator of the stability of any company's work force, was almost identical to the sample year average for Hondo (32 and 34 respectively).

[1] A similar contention has been made in *Rod Ric Corp.* v. *National Labor Relations Board*, No. 822, Oct. Term 1970, petition for certiorari pending.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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